No. 3294

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE BRITISH STEAMSHIP "COOLGARDIE", Libellee, and H. A. THOMSON, Master and Claimant,

Appellants,

vs.

WILLIAM F. JAMES,

Appellee.

APPELLANTS' REPLY BRIEF.

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PERNAU-WALSH PRINTING CO.

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There are several erroneous statements in appellee's brief in this case which call for correction.

On page 2 it is stated "That the mat slipped there is no doubt", citing the testimony of the witnesses Reeves and Brown to the effect that "after the accident" the mat was hanging over the edge of the lumber pile. This evidence is squarely contradicted by four members of the vessel's crew who state that the mat was in the same position as before and had not slipped at all (Hansen, 109; Sinclair, 129-130; Patterson, 148; Krumin, 160). Moreover, there is no evidence other than libelant's that the mat was displaced *by him.*

It might just as well have been displaced by Reeves or Brown who naturally hurried down over it to assist libelant. However, the lower court expressly held that the slipping of the mat, if it slipped, would not render the ship responsible and this ruling is not attacked by appellee and could not be attacked under the numerous cases cited to the lower court on the point (see Dwyer v. Hills Bros. Co., 79 N. Y. Supp. 785; Wall v. Lit, 46 Atl. 4; The Anchoria, 77 Fed. 994; Beltz v. Yonkers, 148 N. Y. 67; Hart v. Greenwell, 25 N. E. 354; Penny v. Hall, 30 N. E. 1016; Jennings v. Thompson, 62 N. E. 256).

It is contended by appellee that we have "again shifted" our position in this matter, that we contended in the court below that Dr. James should have got off the pile of lumber by way of the bitts and that we *now* for the first time contend that he assumed the risk of jumping and should have either sat down on the pile and let himself thus down to the deck or have assisted himself with his hand (see brief pp. 5, 9). But that there has been no such change of position and that *all* of these arguments were pressed by us in the lower court is made manifest by the court's decision *stating expressly* that *each one* of those contentions were made (transcript, pp. 315, 317). On the other hand, it is the appellee who has shifted *his* position. He *expressly* in his libel confined the charge of negligence to the *loose* boards and mat:

> "That said libelant climbed up said Jacob's ladder but upon reaching the rail of said steamship found that he could only get upon the deck thereof by stepping upon a pile of loose and unsecured boards

> covered by an unfastened and unsecured door mat; relying upon the judgment of the captain and master in providing such means for boarding said vessel and thinking that the master and captain had provided a safe means, libelant stepped upon the said door mat intending to then step upon the deck, but *by reason of the negligent and careless piling of said boards and of so unsecurely placing the door mat thereon* the boards and door mat slipped when libelant stepped thereon, precipitating him heavily and violently to the iron deck."
>
> (Transcript, pp. 12-13.)

To now sustain a recovery because the pile of boards was *too high* above the deck is to depart entirely from the pleadings and allow such recovery on an issue which appellants had no chance to meet. Captain Macauley, a pilot of long years experience (and highly commended by this court in The Celtic Chief, 230 Fed. 753, at p. 761), testified on cross-examination that it was *not* customary to provide steps from the rail of a vessel to her deck (transcript, p. 310) and doubtless more evidence could have been produced on this point if it had been made an issue in the case. As it is, the allowance of a recovery upon an act of negligence not charged in the pleadings, where *other* acts of negligence are expressly pleaded, seems to us to violate settled principles of law (29 Cyc. 584, 658; 1 Corpus Juris, 1339, Note 66).

Appellee criticizes us because our answer states that the accident was due to the fact that libelant jumped to the deck, "instead of stepping onto said pile of lumber and thence to the deck", making the further assertion that the step was one of from two and one-half to three feet (brief, p. 5). It should be noted that the *libel*

states (transcript, p. 13) that "libelant stepped upon the said door mat intending to then *step* upon the deck". As a matter of fact, if Dr. James had sat down on the pile or assisted himself with his hand, it *would* have been only a step and a very safe step at that.

Appellee, in referring to *one* of our contentions in the lower court (regarding getting down off the bitts at the end of the lumber pile), cites us as endeavoring to show that "of two ways one safe and one unsafe, the libelant chose the unsafe way" (brief, p. 5). It has, however, never been our view that *either* way of getting down from the pile was unsafe. We have always consistently contended that it was *perfectly safe* for anyone to get down from the lumber pile at any place along its length, if that operation was carefully performed. But if libelant chose to *jump*, instead of taking one of those perfectly safe ways, we submit that he assumed the risk of so doing.

At several points in his brief appellee refers to the presence of the crew as making the jump necessary (brief, pp. 6, 8). We do not think, however, that a pride in demonstrating one's agility will render a ship liable, especially as it has been remarked elsewhere that pride sometimes precedes a fall. Many a man of fifty-seven would hesitate before jumping to edify the public and apparently Dr. James himself *did* hesitate (transcript, p. 148).

Counsel, in claiming that Dr. James acted prudently in jumping, urges that Mr. Brown did the same thing, although on the trial he strenuously contended that

how anyone besides libelant got to the deck was immaterial (transcript, p. 190). Taking the argument, however, for what it is worth, it should be remembered that when Mr. Brown jumped down he was in some haste to help his injured companion and consequently the fact that he jumped is hardly a valid argument to sustain the contention that another person, with no reason to hurry, would get down in the same way. It is to be noted that Captain Reeves got down by placing his hand on the mat (transcript, p. 254).

Referring next to appellee's cases on the subject of contributory negligence in admiralty, we note the contention made that, in such cases, the damages need not always be divided equally. We know of *no* case, however, in which *more* than half damages have ever been awarded as a matter of practice. Judge Hale's view in the Conley case (242 Fed. 591) that such an award might be made was not followed by him when it came to actually assessing the damages in that case (see 250 Fed. 679, 680).

As to the claim that the award should stand, even if there *was* contributory negligence, we think it entirely unfounded. We have not attacked the amount of the award in this case, although we believe it to be the highest found in the books for a case of water on the knee. To say, however, that such an award may be sustained for simply *half* damages is plainly unwarranted and finds no support in the cases cited. The award in the case at bar was for *full* damages on the basis of appellee's freedom from negligence, and, if contributory negligence is found, that award should be

reduced by one-half. We earnestly contend, however, that there was *no negligence* on the part of the ship and therefore that the question of *contributory* negligence is not involved in the case.

None of the other case cited by appellee require any discussion except the three "passenger" cases (brief, pp. 24-26). Those cases plainly indicate a divergence of authority on the points for which they are cited and the passage quoted from the Delamatyr case (24 Wis. at p. 586), while adopted by the Supreme Court of Wisconsin, is not the language of that court at all, but is taken from *the dissenting opinion* in Siner v. Great Western Railway Company, L. R. 3 Exchequer 150 (affirmed in L. R. 4 Exchequer 117). They are also all cases where the passengers were *women* and there are decided indications that the same rule would not be applied to *men*. It is unnecessary, however, to attack those decisions in any way. It is a general custom for passenger carriers to provide station platforms or foot stools and passengers are not expected to get off onto rough ground without such aids. Probably also the same is true as to passenger vessels, which have regular gangways to their decks in place of Jacob's ladders. But it cannot be assumed *nor is it a fact* that cargo ships or tramp freighters like the "Coolgardie" are accustomed or required to provide any such equipment. Probably the court is familiar with the sailing vessels and steam schooners plying in and out of San Francisco carrying deck loads of lumber, where sailors, stevedores and other boarders have to come aboard as best they can, which they have no difficulty in doing. If the

"Coolgardie" owed Dr. James the duty of providing a flight of steps from the pile of lumber (2 feet 9 inches high) to the deck, it owed the same duty to its crew and to stevedores, yet no one could for a moment contend for such a duty in the latter case. Certainly such a duty cannot be assumed in the absence of pleading and proof that it exists and this but illustrates the injustice of deciding this case upon an issue which appellant was not called upon to meet and therefore had no opportunity to meet. If Dr. James had desired or asked for assistance, it would have been furnished him and, if he chose to jump without asking for it, it seems to us clear that he took any risk involved in such a jump, especially as he could easily have got down from the pile *without jumping*. And if a ship is to be held liable because a boarding officer cannot climb down two feet nine inches from a pile of wood to a level deck, where the whole situation is patent to his gaze, it is hard to tell where such liability is going to end.

Another point on which the "passenger" cases are readily distinguishable is in the different degree of care owed by a carrier to a passenger as distinguished from a licensee or invitee (like Dr. James). The Supreme Court of the United States has held that the care required of railroads, as to passengers, is "the utmost caution characteristic of very careful, prudent men" and "extraordinary vigilance, aided by the highest skill" (Pennsylvania Co. v. Roy, 102 U. S. 451; 26 L. Ed. 141, 144). In the case in question the court says:

> "These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required,

> as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger."

In 10 Corpus Juris 856, it is said:

> "In a great majority of the cases it is stated that the carrier, particularly in case of a railroad company, must exercise the utmost care and diligence, or the highest degree of care, prudence and foresight for the passenger's safety; or by another form of expression, the highest degree of care which would be used by a person of great prudence in view of the nature and risks of the business under the same or similar circumstances."

Other definitions frequently employed are "the highest degree of care, prudence and foresight", "the greatest possible care and diligence", "the utmost care and diligence" and "extraordinary care and caution" (Id. 855).

It is well recognized, however, that even a passenger carrier does not owe to an invitee or licensee (unless at least they are passengers) the same degree of care that it does to a passenger, but simply the usual "ordinary care" (Id. 942) and this is even more true as to a mere private carrier which does not transport passengers at all (Id. 38). Indeed, appellee's own cases (brief, pp. 10-14) plainly show that only "ordinary care" or "reasonable prudence" are required in cases

like the one at bar. It is thus apparent that the "Coolgardie" not only did not owe to the appellee the duties she would have owed to a passenger, but also did not owe him the duties due from a *passenger carrier*. She was a mere tramp freighter, not equipped and not supposed to be equipped with the usual appliances for taking care of passengers. This very point is emphasized by a quotation from the case of The Euxinia in our main brief (p. 19), which we here repeat:

> "We agree that the absence of such precautions (viz.: putting a barrier around an open hatch) might render liable, in case of injury to a passenger, the ship and its officers who had omitted them. But no such case is presented here" (150 Fed. at p. 545).

We, therefore, submit that the passenger cases cited by appellee are not in point and that the rule suggested in those cases—namely, that a passenger carrier may be liable for injuries resulting from slight obvious dangers as distinguished from grave obvious dangers—is applicable only to passenger carriers (because of the very high degree of care required of such carriers) and that it is *not* applicable to a case which is governed only by the duty or standard of "ordinary care".

Finally it is to be remarked that appellee considered what he did "an easy jump" (transcript, p. 54) and the lower court found that an ordinarily prudent person would not consider it unsafe to jump (Id. p. 317). If these statements are correct, then it seems manifest to us that the ship was not liable and that it used *ordinary care* in providing a means of ingress even if that means required a jump (which it did not). The result under

such conditions would be an accident pure and simple. It *may* be true, in the case of passenger carriers, that liability will ensue when a slight obvious danger is encountered as distinguished from a grave obvious danger, but to carry this reasoning into other branches of the law is practically to do away with the sound doctrine of assumption of risk and open a wide door to unwarranted litigation. One may well be sorry for the appellee in this case, but that does not warrant holding the ship liable and creating a precedent which cannot fail to be unfortunate.

Dated, San Francisco,
June 13, 1919.

Respectfully submitted,

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